

MINUTES

MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on February 17, 2003 at 9:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: SB 363, 2/13/2003
Executive Action: SB 356, SB 18, SJR 10, SB 37

HEARING ON SB 363

Sponsor: Sen. Walter McNutt, SD 50, Sidney.

Proponents: Mark Taylor, Montana Hospital Association
Charles Brooks, Billings Area Chamber of Commerce
Harris Himes, Self
Steve Turkiewitz, Montana Auto Dealers Association
Ray Kuntz, CEO, Watkins and Shepard Trucking
Brad Griffin, Montana Retail Association
Spook Stang, Executive Vice President,
Montana Motor Carriers Association
Pat Melby, Montana Medical Association
Carl Schweitzer, Bozeman and Kalispell Chambers,
American Subcontractors Association of Montana
John Cadby, Montana Bankers Association
Carey Hegreberg, Montana Contractors Association
Bob Stephens, Montana Grain Growers Association

Opponents: Al Smith, Montana Trial Lawyers' Association
Larry Anderson, Self
Don Judge, Teamsters Local 190
and the Montana Chapter of the Sierra Club
Gene Fenderson, Montana Progressive Labor Caucus

Opening Statement by Sponsor:

Sen. McNutt explained that over the past several decades punitive damage awards have skyrocketed. Punishment has moved from punishing individuals to punishment of corporations, which ultimately results in punishment to the public. Up front, punitive damages have nothing to do with compensation to an individual. Punitives are awarded after awards have been determined in full. SB 363 does not limit attorneys' fees. In **Sen. McNutt's** opinion, attorneys should not have a vested interest in punitives if they are awarded for the purpose of punishment. **Sen. McNutt** fails to see how attorneys being compensated for punishment is part of the equation. SB 363 places a cap on punitives of three percent of net worth not to exceed \$10 million. In addition, **Sen. McNutt** feels the threat of punitives is being used in cases that are never tried. **Sen. McNutt** told of his personal experience in a lawsuit and how he was threatened by plaintiff's counsel with punitive damages. These threats of punitive damages are used to drive up settlements. Punitive damages hurt all Montanans because it increases insurance premiums and costs of products.

Proponents' Testimony:

Mark Taylor, representing the Montana Hospital Association, explained that from a historical perspective, in 2000, the Montana Supreme Court in Finstad struck the unanimous jury verdict requirement in statute for punitive damage awards. HB 212 mirrors that decision and officially strikes the unanimous jury verdict requirement from statute. In terms of SB 363, it is important to understand there is a clear difference between compensatory damages and punitive damages. The rationale behind compensatory damages is to place an injured party back in the place that they were before the injury or wrongdoing. The purpose of punitive damages is two-fold: First, to punish a defendant for a particularly egregious act; and to deter that conduct, or similar conduct, in the future. It is important to recognize that punitive damages are in addition to compensatory damages and are never an offset against litigation expenses. The plaintiff is already made 100 percent whole and punitive damage awards are a windfall. **Mr. Taylor** also believes **Sen. McNutt** was accurate in his theory on how punitive damages are used in real-world application. One hospital responded that in every litigation case, punitive damages were filed as part of the cause of action. Because punitive damages are never covered by insurance companies, that particular hospital had to retain its own legal counsel, which was a major expense. **Mr. Taylor** agreed that punitive damages are used as a threat to bolster settlement amounts.

Charles Brooks, representing the Billings Area Chamber of Commerce, testified that in the interim, the Billings Area Chamber of Commerce prepares a philosophy paper dealing with upcoming issues in the Legislature. The Chamber believes in a civil justice system that is open, accessible to any citizen, and provides full compensation for genuine injury while limiting frivolous litigation. Punitive damages are merely to punish the person being sued. This bill will go a long way toward adjusting problems in the legal arena.

Harris Himes, representing himself, testified that he has been involved in medical malpractice cases both as a plaintiff and a defense attorney. He feels this is a good bill but called the Committee's attention to the difficulty many states are having in keeping doctors. Las Vegas essentially has no doctors because the rates for medical malpractice insurance are so high that they have to life flight patients to other locations. The high cost of medical malpractice insurance is due not only to frivolous lawsuits, but also to punitive damages. He feels **Sen. McNutt's** proposed cap for punitive damages is reasonable.

Steve Turkiewitz, representing the Montana Auto Dealers

Association, presented a scenario of a Main Street auto dealer in Montana being sued by a customer, and how that suit could escalate over the years, costing the parties hundreds of thousands of dollars, for a transaction that was initially worth \$35,000. **Mr. Turkiewitz** feels it is the threat of punitive damages that causes these lawsuits to escalate.

Ray Kuntz, CEO, Watkins and Shepard Trucking, submitted written testimony in support of SB 363. **EXHIBIT(jus35a01)**.

(Tape : 1; Side : B)

Brad Griffin, Montana Retail Association, feels SB 363 will go a long way in bringing down the cost of liability insurance in the coming years.

Spook Stang, Executive Vice President of the Montana Motor Carriers Association, submitted written testimony as a proponent of SB 363. **EXHIBIT(jus35a02)**.

Pat Melby, representing the Montana Medical Association, supports SB 363.

Carl Schweitzer, representing the Bozeman and Kalispell Chambers and the American Subcontractors Association of Montana, feels the ability to get insurance is becoming one of the number one issues in the construction industry. He feels this bill will go a long way in reducing rates and making insurance more available.

John Cadby, representing the Montana Bankers Association, says banks are a target for anyone who has a grievance and banks purchase insurance in an attempt to mitigate those risks. St. Paul has pulled out nationwide of insuring medical providers. Punitive damages create a lottery mentality, and trial lawyers know they can threaten a lawsuit and receive some sort of payment. **Mr. Cadby** stated that bankers have to consider whether a customer will come back and sue if their business does not thrive. This makes it difficult for new businesses to get started in Montana.

Carey Hegreberg, representing the Montana Contractors

Association, operates large fleets of trucks, operates cranes, puts up scaffolding, pours concrete, and, in the course of doing business, accidents happen. This bill will go a long way in balancing the legal system in an appropriate manner and will help their members obtain insurance, bank loans, and stay in business and employ people in Montana.

Bob Stephens, representing the Montana Grain Growers Association, supports SB 363.

Opponents' Testimony:

Al Smith, representing the Montana Trial Lawyers' Association, explained the reason for punitive damages is the recognition for the need for a mechanism in the civil trial arena to deter egregious behavior and to punish companies and people who engage in that behavior to set an example. **Mr. Smith** pointed out that punitive damages are not easily won. Section 27-1-221 sets forth the standard for punitive damages. Actual malice must be proved and the person must deliberately proceed to act in conscious and intentional disregard of the high probability of injury to the plaintiff or deliberately proceed to act with indifference to the high probability of injury to the plaintiff. **Mr. Smith** feels this is a difficult standard to meet. **Mr. Smith** submitted two handouts to the Committee **EXHIBIT(jus35a03)** and **EXHIBIT(jus35a04)**, showing punitive damage awards in Montana. **Mr. Smith** feels punitive damages were awarded sparingly in Montana. Also, **Mr. Smith** pointed out that just because punitive damages were awarded, does not mean the plaintiff actually receives those damages. Often the amount is reduced or taken away by the trial court or on appeal. There is a mechanism under Montana law for the judge or appellate court to set aside or reduce the damages. **Mr. Smith** feels the facts will show there is no crisis in Montana with punitive damages and the award numbers are not huge.

Mr. Smith purported insurance rates are going up for two reasons, the first being our economic situation. Historically, whenever the stock market is down, insurance rates go up. Insurers make their money by taking the money from insurance premiums and investing them in the market. When the market is poor, companies raise their premium rates to cut losses. Publications such as *The Wall Street Journal* and *Business Week* have all come out with articles over the past year saying the insurance industry did it to themselves because they underpriced in the market, did not price premiums in line with what their expected payout would be, and they lost on their gamble in the market. Also, September 11 had a detrimental impact on insurance companies. **Mr. Smith** remembered a past legislative session where they passed a bill putting a cap on damages, which was supposed to make rates go down. This did not happen because lawsuits do not have a direct correlation with insurance rates. **Mr. Smith** was emphatic that it is not that cut and dried.

In addressing the medical malpractice insurance issue in Nevada, **Mr. Smith** stated very strict tort reforms were passed in Nevada

in response to this insurance crisis. This did not result in rate reductions for premiums.

Mr. Smith feels you cannot have a set amount which will address every scenario because there are times when egregious conduct is so severe it would warrant a higher amount of punitives. **Mr. Smith** feels the Committee should not make this decision for all future cases.

Juries are drawn from the rolls of registered voters. **Mr. Smith** reminded the Committee that the same people who elected them are also used for juries.

Mr. Smith expanded on the fact that while plaintiffs' lawyers may be good, defense lawyers are good as well, and it is a matter for decision by the jury. In addition, he feels past awards of punitive damages were not outrageous.

(Tape : 2; Side : A)

Mr. Smith feels the reason no one from the insurance industry testified is because passing this bill will not reduce rates.

Mr. Smith urged the Committee to reject the bill.

Larry Anderson, an attorney from Great Falls, would like to know why, in a civilized society, we would limit a jury's discretion to assess punitive damages against the most egregious wrong-doers in society. **Mr. Anderson** spoke about large companies who practice fraud and deserve to be assessed punitive damages. **Mr. Anderson** reminded the Committee that before a jury can award punitive damages they must be persuaded by clear and convincing evidence. Punitive damages are not awarded on speculation. The statute prescribes certain elements of proof, and also must consider the nature and extent of the fraud or malice. The statute also requires an analysis of the net worth of the company. After the punitive damages assessment has been made, the judge has the responsibility to use the same factors in reviewing the award. If the judge decides the jury has used these factors inappropriately in determining the award, the judge can adjust the award.

Mr. Anderson contended the people who assess punitive damages are your neighbors, registered voters, and went on to explain the jury selection process to the Committee. **Mr. Anderson** said all through history, powerful interests do not like to be judged by ordinary people. **Mr. Anderson** gave an anecdote about a case he was involved in where the insurance company deceived the public about its profitability to avoid being exposed to punitive damages.

Don Judge, representing Teamsters Local 190 and the Montana Chapter of the Sierra Club, asked the Committee to consider why the insurance industry is not present at the hearing. **Mr. Judge** feels insurance rates are up because investments are down. **Mr. Judge** feels this bill will limit punitive damage against some of the nation's worst actors. This cap would also apply in class-action lawsuits which would make settlements much lower. **Mr. Judge** feels this bill will not make insurance rates go down and urged the Committee to give the bill a do not pass recommendation.

Gene Fenderson, representing the Montana Progressive Labor Caucus, believes that living in a free society and the right of tort and the right of litigation is one of our most endearing freedoms in this country. This gives the small guy the right to get adjustments from the very powerful. This particular bill stops the leveling of the playing field. **Mr. Fenderson** believes the industries that want this bill are the same industries who fight being regulated. This is a two-way street and **Mr. Fenderson** asked the Committee to limit tort.

Questions from Committee Members and Responses:

SEN. BRENT CROMLEY stated as he listens to the proponents and their desire to reduce insurance, he is concerned and would like an indication from the insurance industry that passage of this bill would reduce insurance rates and what they could expect to see in the way of a percentage of reduction.

Sen. McNutt responded first they need to get a list of suits that are filed which never go to court. This would give a clear idea of how the insurance companies could come in and substantiate that this would lower rates. To **Sen. McNutt's** knowledge, there is no way to get your hands around this issue because the facts only come out when a case goes to court, and there are very few punitives awarded. You would need the other side of the equation to be able to say insurance rates would drop. Punitives are, more often than not, used as leverage in settlements.

CHAIRMAN GRIMES asked **Ms. Mona Jamison, representing The Doctors' Company,** to address the issue and the bill in a previous session which placed a cap on medical malpractice claims.

Ms. Jamison stated they supported that bill vigorously and stated the \$250,000 cap on non-economic damages would contribute greatly to slowing the escalation of insurance rates. Experience has shown that premium rates for medical malpractice are rising. States with caps at \$250,000 can demonstrate their increases have

only been 15 percent, compared to 40 percent for states without the cap on non-economic damages. **Ms. Jamison** stated the document "Confronting the New Health Care Crisis," published by the U.S. Department of Health and Human Services in July 2002 makes that comparison and sets forth what the differences are in states with and without caps as to the impact on medical malpractice rates. **Ms. Jamison** stated there are a variety of other issues which contribute to the stabilization of premium rates; however the caps have been a huge contributing factor. **Ms. Jamison** added an offset for collateral payments from other sources is also a large contributing factor in stabilization of these rates. As far as The Doctors' Company is concerned, HB 309 had a huge impact on stabilizing premiums for doctors in the state of Montana.

CHAIRMAN GRIMES asked **Ms. Jamison** if she could make any comparisons between that and this bill's ability to stabilize rates for other insurers.

(Tape : 2; Side : B)

According to **Ms. Jamison**, it is a package of reforms, as referenced by the American Academy of Actuaries, that goes toward regulating premium rates. All reforms are viewed as different particular pieces of the pie. **Ms. Jamison** corrected her earlier statement by saying the average premium increase in states with non-economic caps is 15 percent and the states without is 44 percent.

SEN. JEFF MANGAN understands the argument about escalating insurance rates, but is concerned that the Legislature would put itself in a position to override what a jury would look at and limit that jury's decision. He used the W.R. Grace case as an example.

Sen. McNutt responded that if you, as an individual, sued W.R. Grace and were limited to \$10 million, that would not be a bad award. **Sen. McNutt** reminded **SEN. MANGAN** that this is punitive damages, not actual damages. This will allow individuals to sue very large companies, and get a very large settlement and punitive damages.

SEN. MANGAN stated sometimes it seems like it is the practice of large companies to put off taking any action, and money is the only thing punitive to them and will affect them in some way.

Sen. McNutt responded he did not think there is anything that will prevent an individual from suing W.R. Grace. **Sen. McNutt** held that a person must be compensated for actual damages before punitive damages are awarded.

SEN. MANGAN understood that a person will be compensated for actual damages first, but again stated sometimes the only thing large companies understand is a monetary punishment.

SEN. GARY PERRY asked **Mr. Anderson** if he should interpret his statement as when dealing with the issue of punitive damages, you are primarily dealing with such companies as W.R. Grace and Ford Motor Company.

Mr. Anderson responded the punitive damage statute has very specific factors to be weighed in the analysis. Those factors are going to weigh in favor of a small, local business. **Mr. Anderson** told of a smaller case he had where the judge awarded punitive damages in the amount of \$2,500. The statutory factors in the bill address the situation that someone like **Sen. McNutt** would find himself in as a business owner. **Mr. Anderson** opined most small business owners in Montana do not participate in actual fraud or actual malice.

SEN. PERRY wanted to know if threats of punitive damages exist in smaller communities and smaller businesses.

Mr. Anderson answered that is practically the case. In order for a small business to return a living for its owners, it has to encourage and establish good will. Goodwill will not be established if the business is engaged in actual fraud and actual malice. Juries are members of the community.

SEN. PERRY told **Mr. Stang** he was confused because he gets the impression that we are really talking about W.R. Grace and Ford, and **Mr. Fenderson** has referred to the small guy. There is a vast difference between the two. **SEN. PERRY** asked if there are small trucking outfits under his organization who are threatened by lawsuits which would contain punitive damage awards that could put them out of business.

Mr. Stang replied the handout he gave to the Committee contained a letter from Mr. Foley in Billings, a small trucking company, and Watkins Shepard Trucking is also a small company by national standards.

SEN. JERRY O'NEIL understood that W.R. Grace had paid million of dollars in punitives, yet **Mr. Smith's** list reflects they paid only \$83,000.

Mr. Smith responded that they can only disclose what is reported to the public. Many cases against W.R. Grace were settled before trial, and those settlements would not be reflected on the list.

SEN. DAN McGEE asked **Mr. Smith** to address whether an attorney could ever charge implied malice or implied fraud in advance of settlement discussions. **SEN. McGEE** clarified that actual fraud and actual malice are determinations made by the court. **SEN. McGEE** wondered if prior to going to court, it could be alleged that there was malice and fraud and, therefore, if there is found to be actual malice and actual fraud, a plaintiff would further seek punitive damages.

Mr. Smith stated actual malice and actual fraud would be alleged in the complaint and the things that demonstrate actual malice and fraud will be brought out in trial.

SEN. McGEE asked if **Mr. Smith** is aware of any instances where lawyers have used the threat of seeking punitive damages to enhance the potential for higher settlements.

Mr. Smith replied that has not happened to him personally and he is not aware of any situation where that has occurred.

SEN. AUBYN CURTISS has been looking into statistics regarding the asbestos issue. There are about 600,000 cases jamming the court system nationwide, and the American Bar Association (ABA) is considering tort reform. She wonders how much of that is related to punitive damage awards. **SEN. CURTISS** pointed out that according to the RAND Institute of Civil Justice survey, 65 percent of the awards to date have gone to people who are not seriously harmed and their exposure to asbestos has not affected their daily lives. That same study also said they consider 85 percent of the businesses in the country are vulnerable over asbestos issues. **SEN. CURTISS** asked if punitive damages have been awarded to some of the 65 percent of the claimants, where are the rest of the people who have just cause going to come out and where is the money going to come from.

Mr. Smith agreed the ABA has recommended a change to litigation involving asbestos. In that situation, they are talking about 60 percent of the people in Libby who have that disease would be precluded from that settlement. People who are walking around with oxygen tanks 24-hours-a-day would be precluded under these guidelines from getting a judgment. Those may be part of the population the RAND Institute considers to be "not sick." **Mr. Smith** feels part of the reason we are seeing these cases across the country with folks who have not yet exhibited symptoms is that we have a statute of limitations in which lawsuits have to be filed either after you have actually been injured or after you should reasonably know you are injured. For a number of these folks who have X-rays which show scarred lungs, even though they are not yet sick, they have knowledge that their lungs could be

damaged due to asbestos exposure. If they wait until they are sick, they will have missed the statute of limitations. **Mr. Smith** does not know how many of the cases have actually received punitive damages and does not know the specifics of cases that have settled. **Mr. Smith** stated asbestos is a unique area because it takes a long time for it to affect people. Most asbestos litigation is not as cut and dry as it was with W.R. Grace.

SEN. CURTISS then asked **Mr. Smith** if he believes the driving force behind the request for tort reform has to do with changing the statute of limitation relative only to asbestos cases.

Mr. Smith stated the driving force behind the ABA's reforms on asbestos litigation is to protect the asbestos companies.

CHAIRMAN GRIMES asked **Mr. Smith** to explain his position given the nature of the seminars that taught trial lawyers to "go after trucking companies."

Mr. Smith responded the Montana Trial Lawyers Association has not sponsored a seminar on this and believes those seminars may have been sponsored by the American Trial Lawyers Association. **Mr. Smith** does not know the specifics of those seminars.

(Tape : 3; Side : A)

Mr. Anderson responded to **CHAIRMAN GRIMES'** question, and stated he was at the American Trial Lawyers Association's meeting last year and attended the trucking seminars. Certainly, in all of the ATLA seminars, and MTLA's seminars, the focus is what is the evidence you need to gather to prove your case. The question in all those cases is could reasonable prudence minimized or eliminated the injury or death.

CHAIRMAN GRIMES then asked **Mr. Kuntz** about the national task force, and the issues it has dealt with. Specifically, **CHAIRMAN GRIMES** would like to know whether insurance rates have to do with market conditions rather than tort conditions.

Mr. Kuntz replied the task force was made up of economists, insurance company executives, executives of trucking companies, and attorneys. The task force was attempting to find a solution to bring insurance costs down. The Wall Street scenario is partially correct. This, however, is a small part of the situation and insurance companies are not getting a large return on their investments. This does contribute to higher prices. However, the task force determined the single biggest factor affecting insurance rates is the cost of settlements. There are thousands of settlements per year which are over one millions

dollars. The costs of these settlements drive the insurance rates.

CHAIRMAN GRIMES then asked **Mr. Kuntz** what Watkins Shepard's total payroll is in Montana and how much their premium had increased.

Mr. Kuntz responded the total payroll in Montana is \$14 million. Their liability insurance went from \$1.5 to \$3.5 million. That was on September 1, eleven days before 9-11. This is the reason most trucking companies are not paying insurance. **Mr. Kuntz** asked the Committee to keep in mind it is their constituents who drive Montana's highways and are at risk if they are involved in an accident with a trucking company that is no longer carrying an adequate level of insurance.

SEN. MIKE WHEAT asked if their insurance covered punitive damages.

Mr. Kuntz replied in several states you can insure against punitive damages and in some states you cannot. He is not sure whether his insurance will cover punitive damages, but added he suspected it would not.

SEN. WHEAT asked if there was a direct correlation between the increase in liability rates and the availability of punitive damages.

Mr. Kuntz explained that plaintiff attorneys look at driving records, hiring records, and look for something in a driver's past that is not really punitive, but then use that threat of a jury perceiving it as being punitive, to drive up the settlement amount.

SEN. WHEAT asked **Mr. Kuntz** if he would agree that just because a claim for punitive damages is made, does not mean the jury will award punitive damages.

Mr. Kuntz did not quite agree and stated what happens they are not willing to go to a jury trial in most cases to find out. It is the threat of punitives that drives settlement and escalates the amount of that settlement.

SEN. WHEAT reminded **Mr. Kuntz** they have a right to go to a jury trial and find out if punitive damages would be awarded.

Mr. Kuntz stated they do not have the resources to take the risk of a jury awarding \$30 million in punitives. They sometimes have to settle cases for an amount that will allow them to walk away and still remain in business.

SEN. WHEAT asked **Ms. Jamison** if medical malpractice policies typically provide coverage for punitive damages.

Ms. Jamison said it is available as a rider on a policy due to the fact that punitives are rare in med mal cases.

SEN. WHEAT asked **Sen. McNutt** why he wants to take the award of punitive damages away from the judge and jury and have the Legislature dictate what those punitive damages are going to be.

Sen. McNutt spoke about the case he was involved in and the threat of punitive damages being used to force settlement of the case for a higher amount.

SEN. WHEAT asked if **Sen. McNutt** would agree the statute requires actual fraud or actual malice before punitive damages can be recovered.

Sen. McNutt feels there are a lot of claims made that are not factual and anything can be alleged.

SEN. WHEAT agreed that anybody can make a claim, but that does not make it so. **SEN. WHEAT** asked what we are going to do to change the threat by changing the punitive damage statute to cap whatever is available, and why not leave it with the judge or jury to make that determination.

Sen. McNutt believes that providing a cap will limit the threat, and that threat is driving up settlement costs. They cannot determine how many cases, that contained punitives for fraud, are filed and then settled.

SEN. WHEAT asked where the empirical data is to support the bill. He believes the bill was brought because **Sen. McNutt** had a case against him and punitive damages were threatened.

Sen. McNutt agreed and stated many others have had the same experience.

SEN. WHEAT asked if there was empirical data that would support his claim that if punitive damages were capped it would impact liability costs.

Sen. McNutt replied he does not have any empirical evidence supporting or not supporting this claim.

SEN. PERRY would like an estimate of the percentage of times a defense attorney will advise his client to go to trial or how

often the defense attorney will tell his client he is better off economically to settle.

Mr. Kuntz replied over the last 15 years, Watkins Shepard has only had two major accidents, and both times the defense attorney recommended settlement rather than going to court. As a company, you have to advise the insurance company to settle for the legal limit, because if you go to court, the amount over the insurance policy limits becomes the company's responsibility. If you push your insurance company and defense attorney too hard, and the award is above what a company is insured for, a company can find itself out of business. In both cases, the defense attorneys recommended settlement for policy limits.

SEN. PERRY confirmed that the decision to settle is purely an economic business decision and generally advised by the defense attorney.

Mr. Kuntz stated **SEN. PERRY'S** understanding was correct.

Closing by Sponsor:

Sen. McNutt closed by stating he has one amendment to offer. The calculation of the \$10 million and three percent is incorrect, and the amendment would correct the calculation.

Sen. McNutt urged the Committee to look at the facts. The fact is there are not a lot of punitives awarded, but it is very costly to defend against these claims. The bulk of these cases never get to court. To say the threat of punitives does not drive up settlement costs, then why would an attorney threaten to add punitive damages to the claim against **Sen. McNutt**, if he was not trying to drive up the costs?

Sen. McNutt argued that as far as companies like W.R. Grace and Ford Motor are concerned, we will never know what settlements were made in the cases that did not go to trial. Those settlements are not a matter of record. **Sen. McNutt** stated 9-11 cannot be blamed for the rising cost of premiums, since his premiums have been going up for a long time.

EXECUTIVE ACTION ON SB 356

Motion: **SEN. PERRY** moved **SB 356 DO PASS.**

Discussion:

CHAIRMAN GRIMES explained the proposed amendment SB035601.av1.
EXHIBIT(jus35a05).

Motion/Vote: SEN. McGEE moved amendment SB035601.avl BE ADOPTED.
The motion carried with SEN. MANGAN voting no.

Motion: SEN. McGEE moved SB 356 DO PASS AS AMENDED.

Discussion:

(Tape : 3; Side : B)

SEN. O'NEIL asked if the title of the bill needed to be changed.

Ms. Lane agreed and will change the title of the bill accordingly.

SEN. WHEAT asked if the cities and towns or counties currently have the ability to adopt an ordinance that deals with public nudity.

CHAIRMAN GRIMES stated if they are a county that has its own powers under the Constitution, they are allowed to have more restrictive laws. If they are general powers counties then they are not allowed. This will allow the general powers counties to do what is currently allowed to cities already.

SEN. MANGAN expressed concerns with the penalties and wondered if that was stricken in the amendment.

CHAIRMAN GRIMES stated this was stricken. Ms. Lane verified that on line 25, after the word "that" the rest of line 25 through "penalty" on line 26 has been stricken.

Vote: The motion SB 356 DO PASS AS AMENDED CARRIED with Senators Cromley, Mangan, Pease, and Wheat voting no on a roll call vote.
Note: The new amendment, SB035602.avl, was submitted to the secretary after the hearing. **EXHIBIT(jus35a06)**.

EXECUTIVE ACTION ON SB 18

Motion/Vote: SEN. MANGAN moved SB 18 BE TABLED. The motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SJR 10

Motion: SEN. O'NEIL moved SJR 10 DO PASS.

Discussion:

SEN. CROMLEY thanked **SEN. O'NEIL** for bringing the bill, but expressed his concern that states like Montana would be harmed by doing away with the 17th Amendment because the Legislature would become more pendulum-like in its selection of legislators.

SEN. MCGEE stated if this is adopted by all the states and becomes an amendment to the Constitution but he believes that the founding fathers decided the U.S. Senators would be elected by the Legislatures and this went on for 100 years. **SEN. MCGEE** is concerned about the affects of term limits and turnover in the Legislature. **SEN. MCGEE** tends toward what was established by the founding fathers.

CHAIRMAN GRIMES stated in the last 20 to 40 years there has been a significant shift in such things as the welfare clause and how it is applied. It seems to **CHAIRMAN GRIMES** that some of the problems which lead to the 17th Amendment would be substantially mitigated today. **CHAIRMAN GRIMES** feels this is more than a novel idea and it is historically significant.

SEN. WHEAT commented that it is an interesting issue and he is persuaded because, obviously, around the turn of the Century there was a problem with the selection of U.S. Senators by the Legislature. **SEN. WHEAT** feels the issue is important enough to be discussed on the floor of the Senate.

SEN. PERRY feels it is an interesting issue, and he would like to hear debate on the issue on the floor of the Senate.

SEN. O'NEIL suggested considering that no one can be kicked out mid-term by a fifty percent majority. The Committee may want to consider raising that to a sixty percent vote. He is worried about U.S. Senators being expelled from Congress because there is a shift in parties in the state Legislature.

CHAIRMAN GRIMES suggested holding the bill in Committee while **SEN. O'NEIL** worked on the amendment.

SEN. O'NEIL decided not to pursue the amendment since there was not interest by the Committee.

Vote: **SEN. O'NEIL's** motion that **SJR 10 DO PASS, CARRIED** by a roll call vote with **Senators Cromley, Mangan, and Pease voting no.**

EXECUTIVE ACTION ON SB 37

CHAIRMAN GRIMES stated the subcommittee met with the House and what they have decided to do is to place the DUI bills into one bill with the most onerous provisions of any bill being contained in the omnibus bill. **CHAIRMAN GRIMES** gave the Committee a spreadsheet containing existing law, proposed changes by various bills, and changes being proposed by the Committee.

EXHIBIT (jus35a07) .

CHAIRMAN GRIMES stated that over the years the penalties for fourth offense DUI have become weaker even though it is a felony offense. He feels the penalties should be made stronger. In addition, none of the laws regarding refusal to blow had changes proposed. An interlock device will cost around \$100 to install, and then it would cost \$65 a month to keep it on a vehicle. There is no incentive provided to take a Breathalyzer.

Fines and jail time penalties are increased for all offenses.

CHAIRMAN GRIMES stated it is his understanding, with regard to the issue of license suspension, if a person gets a DUI right now and does not get another one within five years, the penalties under fines and jail time start over. However, if you get a third DUI, they go back and count them all.

SEN. MANGAN pointed out that interlock is discretionary at .18 or higher. **SEN. MAHLUM** dropped that level to .16 in his bill. **SEN. MANGAN** feels it should be mandatory after .16 and mandatory for any first-time DUI. **SEN. MANGAN** feels it is unclear under the Senate changes whether the interlock is mandatory for .16 or higher.

CHAIRMAN GRIMES stated it did not change and he overlooked putting it in. **CHAIRMAN GRIMES** wonders what the Committee wants to do with first offense DUIs.

SEN. CROMLEY asked if an interlock is installed, what level it is installed at.

(Tape : 4; Side : A)

SEN. MANGAN responded he believes interlock device will not start at .02. Therefore, if you have a drink, you cannot start the car. **SEN. MANGAN** would like to see some discretionary language for judges. He likes the mandatory language for .16, but would like the Committee to consider giving the judges discretion in ordering an interlock on any DUI.

CHAIRMAN GRIMES asked how the Committee felt about this.

SEN. McGEE spoke in favor of this. In 1995 the fourth-time felony DUI had a very severe penalty which resulted in over-crowded prisons. Then the penalties were reduced to ease the impact on the prisons. What should have been done is increased the penalties for the first, second, and third offenses and maybe an offender would never have reached the fourth DUI. **SEN. McGEE** asked the Committee to keep in mind that just because a person gets pulled over for a first-time DUI, it is not the first time the person has been out on the road under the influence of alcohol or drugs. It is just the first time they have gotten caught.

SEN. McGEE asked **SEN. MANGAN** if he knows what happens with an interlock if a person drinks an O'Douls and, if a person is .08, how long does it take for that to get out of the system before they can start a car with an interlock device.

SEN. MANGAN responded the devices are very sensitive. They advise their clients not to chew, or use mouthwash with alcohol. They tell their clients to avoid anything that is alcohol based.

CHAIRMAN GRIMES stated the question is at what level do they want to make the interlock mandatory.

SEN. O'NEIL wanted to know the price of interlocks and if they could be set at different rates before the vehicle will start.

SEN. MANGAN responded both companies charge approximately \$70 to \$75 to install an interlock and \$70 to \$75 per month. In response to **SEN. O'NEIL's** second question, **SEN. MANGAN** stated they can be set for different levels, but that would not ever happen because if someone has alcohol on their breath, they do not want that person driving.

CHAIRMAN GRIMES stated the level for interlock device will be set at .16.

SEN. PERRY asked for clarification.

CHAIRMAN GRIMES stated they will mandate an interlock device be placed on a vehicle at .16 or over, and between .08 and .16, the interlock will be up to the discretion of the judge.

SEN. MANGAN stated current law provides an interlock device is discretionary at .18 or higher.

Ms. Lane clarified that at .16 or higher it would be mandatory, and below .16 the interlock device will be discretionary. She feels there is confusion between blood alcohol content (BAC).

SEN. O'NEIL asked at what point **SEN. MANGAN** would need to declare a conflict of interest since he manufactures interlock devices and whether he has to redeclare the conflict on the floor of the Senate.

CHAIRMAN GRIMES replied **SEN. MANGAN** has already gone on the record as declaring a conflict of interest, and is not sure if he would need to redeclare the conflict on the floor.

SEN. MANGAN further responded that it is his practice to declare the conflict both in Committee and on the floor of the Senate. In addition, he has discussed the matter with the Chairman of the Ethics Committee.

CHAIRMAN GRIMES stated on first offense DUI if a person chooses not to blow, he is proposing no probationary license be issued. On the second offense DUI, the existing proposal is the license be suspended for one year with no probation, and then after the first year, the license can be issued after a course is taken.

CHAIRMAN GRIMES is suggesting that after one year the license can be reissued if the person blew. If they do not blow, the suspension is for two years and it would cost \$300 to reinstate the license. This ratchets up the penalty without using jail time. Instead, the driver's license is used as an increasingly onerous sanction. The third offense is basically the same, except it will cost \$500 to reinstate the driver's license.

SEN. CURTISS asked what the current cost of the interlock device is and if they are readily available state wide.

SEN. MANGAN replied they are approximately \$70 to install and \$70 a month and they are available across the state.

Brenda Nordland, Department of Justice, reported the Committee is accurate regarding current law with the changes concerning the first offense and interlock discretion being at .18. They are also accurate regarding second and third offense as applied to license suspension. **Ms. Nordland** pointed out that on the proposed changes, the one item not listed under proposed changes but is in HB 195 is the mandated interlock on second or subsequent for the repeat offender bill. The suspension would be for a period of one year following the one year hard suspension.

CHAIRMAN GRIMES suggested adding in mandated interlock for one year following the reissuance of a license.

CHAIRMAN GRIMES stated on the fourth offense felony, a person is sentenced to 13 months in jail, but is let out if they successfully complete a residential alcohol treatment program. That will be left as is, but **CHAIRMAN GRIMES** suggested revoking the driver's license for fourth offense felony for a period of five years. The first two of those years will be a hard suspension meaning no probationary license will be issued. For the next three years, you can be issued an interlock if it is okay with your probation officer. The second proposal is if a person is caught driving without a license, it will be called a felony.

SEN. O'NEIL stated that no driver's license for two years will escalate welfare costs. **SEN. O'NEIL** would prefer that it be mandated that they can only drive to and from work and they have to have an interlock device on their car.

SEN. MCGEE stated he knows of a man in Laurel who received his second DUI in North Carolina. **SEN. MCGEE** provides transportation to and from work for this man, as does the man's parents. This man is not drinking and not driving and recognizes he cannot do this anymore. **SEN. MCGEE** feels as policy makers, the Legislature needs to tell fourth time felony offenders they do not have a right to drive, and after two years of revocation, the offender will be controlled and monitored for three years to make sure they stay in line.

SEN. MANGAN pointed out that whenever you see a third or fourth DUI, there is almost always the additional charge of driving while suspended. **SEN. MANGAN** feels a harder sanction when caught driving without a license might carry some weight.

SEN. PERRY stated the interlock device is a relatively high-tech device as is electronic incarceration. **SEN. PERRY** does not see any discussion about that. He also feels that to make an interlock mandatory after .16 is taking the teeth away from lowering the BAC from .1 to point .08. **SEN. PERRY** feels the interlock should be mandatory at a lower level. **SEN. PERRY** feels people should be encouraged after the first offense to take drinking and driving more serious. **SEN. PERRY** noted as he goes down the chart, Exhibit 7, he sees more people going to jail. This has not been a solution in the past. Increasing the fines could ultimately increase jail populations with people who cannot afford the fines. **SEN. PERRY** argued electronic incarceration keeps people working, paying taxes, providing for their family, but they have a 24-hour reminder on their ankle of what they did.

CHAIRMAN GRIMES asked that electronic incarceration be considered when the Committee discusses fines and jail time. **CHAIRMAN**

GRIMES intent on license suspension is to deal with driver's license issues and not jail time.

CHAIRMAN GRIMES inquired how the Committee felt about going to a lower level for the interlock.

SEN. O'NEIL agreed it should be lowered to .12 on the first offense. Also, he thinks there should be a penalty for someone who attempts to avoid the interlock device or if they loan a car to someone they know is supposed to only be driving with an interlock.

CHAIRMAN GRIMES stated there is a penalty for failure to use an interlock device, and that basically says the interlock will be put back on if you fail to use it.

SEN. McGEE suggested making the interlock mandatory at .08 the first time.

SEN. McGEE then asked **SEN. PERRY** about his impairment at .10 during the recent controlled test and how impaired a person is at .10.

SEN. PERRY reported the test altered his behavior on a personal level. He now has his own Breathalyzer in his vehicle. They predicted that in order to take **SEN. PERRY** to .08 would take eight ounces of rum. Somehow, they miscalculated and took him to .114. Either way, by the time he was one-third of the way through the eight ounces of rum, he knew he would not be driving. **SEN. PERRY** clearly stated nobody should be driving at .08.

SEN. WHEAT feels that the Committee is getting away from the idea that it is the judge sitting in the chair that sees these offenders, and the Committee should put themselves in the shoes of a businessman who shows up for the first time in court on a DUI charge. This person may really need to be able to drive. The judge really needs to be able to use his discretion at this point. **SEN. WHEAT** feels the judge should have discretion with .08 up to .16 for the first offense.

(Tape : 4; Side : B)

CHAIRMAN GRIMES suggested making the level .16 for now and then that level could be amended later. He also suggested if someone is caught driving without a license, that be considered a felony.

SEN. WHEAT reminded the Committee if the fourth offense is a felony, then subsequent offenses would also be considered felonies.

Ms. Nordland asked the Committee to look at existing law on driving while suspended or revoked. There is not a felony provision in that law and this would be a huge change resulting in a huge fiscal note. 61-5-212 is the section the Committee needs to review. This has a mandatory jail time of a minimum of two days and a maximum of six months. The fine is a maximum of \$500.

CHAIRMAN GRIMES asked if it is a felony right now under current law, that they get off quite easily if they have taken the course.

Ms. Nordland is confused because they are talking about a DUI felon sentenced under the DUI felony statute. If a person is driving while suspended or revoked, they are sentenced under 61-5-212. They may have violated their probation under the felony sentence, but driving while suspended does not launch an offender into felony status for that offense alone.

SEN. CROMLEY supposed there are other reasons a person could be driving with a suspended license.

SEN. O'NEIL suggested making it be a mandatory interlock device if someone is caught driving with a suspended or revoked license.

CHAIRMAN GRIMES stated they would not need an interlock device if they have a suspended license.

SEN. O'NEIL thought they could have a mandatory interlock sentence be imposed.

SEN. MANGAN stated you would be encouraging someone to drive without a license in a sense.

SEN. MCGEE wondered why the fourth offense DUI does not have a revocation of five years to life, leaving that up to the discretion of the judge.

SEN. WHEAT wondered what happened to the idea of taking away someone's right to register a vehicle. **SEN. WHEAT** was thinking this should be imposed on third offense DUIs.

CHAIRMAN GRIMES apologized and said he inadvertently dropped that idea when compiling the chart.

Ms. Nordland informed the Committee, for purposes of the fiscal note, they assumed the judge would ask the offender to identify the vehicles in which the offender had an interest, and that would be part of the order. From that identification, they could

flag the vehicle registry at title and registration. If this could happen at the front-end, the fiscal impact would be minimal.

CHAIRMAN GRIMES suggested putting in the language about revocation of registration.

SEN. O'NEIL believes thought should be given to prosecuting someone who loans a car to a person with a revoked license.

CHAIRMAN GRIMES also asked the Committee to consider expungement of records. **CHAIRMAN GRIMES** suggested if there were no additional sanctions in five years or whatever the Committee decides, then the DUI would be expunged if the offender blew no higher than .10. **CHAIRMAN GRIMES** also wanted to authorize bartenders to not serve people branded with DUI licenses.

CHAIRMAN GRIMES has been wrestling with the whole idea of liability for bar owners. He is of the opinion, bartenders are the front line on this issue because they are the ones that can help the most. **CHAIRMAN GRIMES** suggested having an alphabetical posted advisory notice of fourth offense felons sent to tavern owners with the explicit language that this creates no obligation on their part.

SEN. MANGAN pointed out that if this idea is going to cost money, which it probably would, he would rather put the money into probation and parole to aid in monitoring fourth-time offenders and ensure they are complying with the terms of their probation. Since probation and parole is going to be the front line of defense, they may need to be strengthened.

CHAIRMAN GRIMES stated this idea would cost some money, but still feels it is a worthy idea.

SEN. CROMLEY thinks there would be quite a bit of opposition from retail dealers and tavern owners since they may see this as increasing their liability.

CHAIRMAN GRIMES replied the language would be explicit in the code that it is simply an advisory notice and retail dealers and tavern owners are under no obligation.

ADJOURNMENT

Adjournment: 12:42 P.M.

SEN. DUANE GRIMES, Chairman

CINDY PETERSON, Secretary

DG/CP

EXHIBIT (jus35aad)